96-270

(26)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*
Petitioners,
v.
GEORGE WINDSOR, *et al.*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

JOINT OPPOSITION TO CARGILE RESPONDENTS' MOTION FOR DIVIDED ARGUMENT

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January 27, 1997

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All of the other separately represented individual and institutional parties who object to this class action join in this opposition to divided argument, and have agreed upon a single advocate (Laurence Tribe) to advance all of the various alternative grounds for affirmance presented in their respective briefs.

ARGUMENT

The Cargile respondents acknowledge "this Court's reluctance to permit divided argument." Motion at 1. Indeed, Rule 28 provides that "[d]ivided arguments are not favored." Accordingly this Court routinely denies motions for divided argument.[1] As Justice Jackson once observed:

> When two lawyers undertake to share a single presentation, their two arguments at best will be somewhat overlapping, repetitious and incomplete and, at worst, contradictory, inconsistent and confusing. ... [A]n argument almost invariably is less helpful to us for being parceled out to several counsel.

Justice Jackson, Advocacy Before the Supreme Court, 37 A.B.A.J. 801, 802 (1951).

The Cargile respondents fail to identify any unusual circumstances that could justify divided argument in this case. The mere desire of different parties with the same interests to be

[1] See, for example, in this Court's most recent Terms, Exxon Co., U.S.A. v. Sofec, Inc., 116 S. Ct. 1038 (1996); Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S. Ct. 812 (1996); 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 35 (1995); North Star Steel Co. v. Thomas,115 S. Ct. 1354 (1995); Crown Cork & Seal Co. v. Steelworkers, 115 S. Ct. 1354 (1995); U. S. Term Limits, Inc. v. Thornton, 115 S. Ct. 39 (1994); Bryant v. Hill, 115 S. Ct. 39 (1994); Director, Office of Workers' Compensation Programs v. Greenwich Collieries,114 S. Ct. 1291 (1994); Dalton v. Specter, 510 U.S. 1038 (1994); Department of Defense v. FLRA, 509 U.S. 951 (1993); Lamb's Chapel v. Center Moriches Union Free School District, 506 U.S. 1032 (1992).

represented by different attorneys emphasizing slightly different lines of argument is not a sufficient reason for divided oral argument. Robert L. Stern, et al., SUPREME COURT PRACTICE § 14.5, at 478 (7th ed. 1993) (citing Illinois v. Abbott & Associates, 459 U.S. 1012, 1031 (1982)). In fact, in the ordinary case allotted an hour for oral argument, this Court "usually denies divided argument even if the parties on one side of the case have divergent interests." Id. (citing Michigan Citizens v. Thornburgh, 493 U.S. 888 (1989), and Whitmore v. Arkansas, 493 U.S. 1015 (1990)). A fortiori divided argument is unjustified where, as here, the parties do not represent divergent interests.

The Cargile respondents do not suggest that their interests are different from those of the other respondents — nor could they. By their own account, the Cargile respondents are six class members, three of whom developed mesothelioma (an invariably fatal asbestos-related disease) after the opt-out period closed (they have since died). They received no notice of this class action. The other three Cargile respondents are class members who, like everyone exposed to asbestos, are at risk of developing mesothelioma some day. Brief for Cargile Respondents at 2. The interests of the Cargile respondents are identical to those of the other respondents here. Respondents Casimir Balonis, Louis Andersen and Richard Blanchard are class members who likewise received no notice of this class action and likewise have succumbed to mesothelioma that they developed after the opt-out period closed. Respondents George, Constance, Michael and Karen Windsor are class members who have been exposed to asbestos and are therefore at risk of developing mesothelioma and the entire range of asbestos-related maladies. The other respondents include the White Lung Association of New Jersey (an asbestos victims' group with more than 10,000 members), the National Asbestos Victims Legal Action Organizing Committee

(an umbrella organization representing some 15 separate victims' rights groups), the Oil, Chemical and Atomic Workers International Union (with 300,000 present and former members, 90% of whom were occupationally exposed to asbestos), and the Skilled Trades Association. Many of the members of these respondent organizations are, like the Cargile respondents, class members residing in California, and all of them share the same interest in having this class action decertified, the class-wide injunction vacated, and the judgment below affirmed.

Since the Cargile respondents do not claim to have interests distinct from (let alone conflicting with) those of the other respondents, it should come as no surprise that the Cargile respondents do not seek a different result in this Court. The Cargile respondents, like the other three groups of respondents, contend that the judgment below should be affirmed. Brief for Cargile Respondents at 43 ("Conclusion"). The Cargile respondents, like the other respondents, likewise contend that the Third Circuit correctly concluded that this proposed class action failed to meet the certification requirements of Rule 23 and that this class action failed to provide adequate notice to absent class members. *Id.* at 43.

Thus, the only basis offered by the Cargile respondents to distinguish themselves from the other respondents is that the Cargile respondents have not pressed the full range of Fed.R.Civ.P. 23, federalism and justiciability arguments presented by the other Respondents and instead proffer only what they term a "narrower" subset of those arguments, focusing on just part of Rule 23.[2]

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[2] The other respondents, like the Cargile respondents, also press the contention that this class action fails to meet the requirements of Fed.R. Civ.P. 23(b)(3). *See* Brief for White Lung Respondents at 36-42; Brief for Windsor Respondent at 26-28, 48-50. Similarly, the other respondents place great weight on the same notice and due process arguments favored by the Cargile respondents. *See* Brief for Balonis Respondents at 28-41; Brief for White Lung

The Cargile respondents' characterization of their approach as "narrower" is mistaken. From this Court's institutional perspective, the narrowest ground for decision is a ruling on subject matter jurisdiction, particularly Article III justiciability — a question that always precedes consideration of the merits and that, indeed, will be raised by the Court sua sponte if the respondents fail in their duty to address the issue. Metro. Wash. Airports Auth. v. Citizens For Abatement of Aircraft Noise, 501 U.S. 252, 265 n.13 (1991); ASARCO v. Kadish, 490 U.S. 605, 611 (1989); Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). By asking this Court to reach out and decide major questions concerning Rule 23(b)(3) and due process in a feigned case in which the exposure-only plaintiffs have no injury in fact and have failed to meet the amount-in-controversy requirement for diversity jurisdiction, the Cargile respondents have inverted the order of this Court's prudent responsibilities as an Article III tribunal of limited jurisdiction.

Although the unwillingness of the Cargile respondents' counsel to address the full range of issues raised in the briefs of the other respondents plainly makes him unsuited to present oral argument on behalf of all the respondents in this case — an oral argument that will include the justiciability arguments that led petitioners to seek, and this Court to grant, an extension in the length of the petitioners' reply brief — it does not justify dividing the argument. The mere desire of counsel for one party to emphasize only some points of common interest is not a sufficient reason for divided argument.

All of the other individual and institutional parties who object to this class action join in this opposition to divided argument, and have agreed upon a common advocate to advance all of the various arguments presented in their respective briefs and all of the various alternative

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Respondents at 38-42; Brief for Windsor Respondents at 48-49.

grounds for affirmance (including the particular Rule 23(b)(3) grounds favored by the Cargile respondents), relating both to the threshold questions of jurisdiction and justiciability and to the merits of the proper application of Fed.R.Civ.P. 23 in a diversity class action. There is no warrant for dividing the argument so that a few respondents, who concede that they have no interests distinct from the rest and that they seek the identical result, can repeat the particular subset of arguments for affirmance that they personally find most appealing.

CONCLUSION

The motion for divided argument should be denied.

Respectfully submitted,

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